

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

ROSS ELECTRIC OF WASHINGTON,  
INC.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT  
OF ECOLOGY,

Respondent.

PCHE No. 86-225

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal of a \$25,000 civil penalty for alleged violations of dangerous waste regulations, came on for hearing before the Pollution Control Hearings Board in Lacey, Washington, on October 14 and 15, 1987, and in Seattle, Washington, on October 26, 1987.

Leslie Nellerhoe, attorney at law, represented appellant Ross Electric of Washington, Inc. Jay J. Manning, Assistant Attorney General, represented Department of Ecology. The proceedings on days one and three were reported by Cheri L. Davidson, and on day two by Leslie Gray.

1           Witnesses were sworn and testified. Exhibits were admitted and  
2 examined. Post-hearing arguments of counsel were submitted on  
3 December 1, 1987. From the testimony heard, exhibits made, and  
4 contentions considered the Board makes the following

#### 5                               FINDINGS OF FACT

##### 6                               I

7           Appellant Ross Electric is a Washington corporation in the  
8 business of scrapping transformers which have been used by electric  
9 utilities. The scrapping operation involves draining the transformers  
10 of fluid and then incinerating the drained cores. After incineration,  
11 valuable metals (principally copper) are removed and sold.

12           The company's operations are carried out at what is called the  
13 Logan Hill site near Chehalis in Lewis County, Washington. In 1986,  
14 the company processed over 8,000 transformers at this location.

##### 15                              II

16           Respondent Department of Ecology is a state agency with authority  
17 to adopt and enforce a state-wide program of hazardous waste  
18 management. Pursuant to this the authority, the state has adopted  
19 chapter 173-303 WAC, Dangerous Waste Regulations.

##### 20                              III

21           Ross Electric has been operating at the Logan Hill site since  
22 1983. The company processes only transformers which contain 50 parts  
23 per million (ppm) polychlorinated biphenyls (PCBs) or less. (The  
24 transformers are accompanied by gas chromatograph tests provided by  
25

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND ORDER

1 the utilities to demonstrate compliance with this PCB limit.) After  
2 the transformers are received, the fluids they contain are removed,  
3 with oils containing less than 2 ppm PCBs being routed to a holding  
4 tank and those containing between 2 and 50 ppm PCB being incinerated.  
5 The transformer carcasses are rinsed and shredded after the cores are  
6 removed. The cores and coils are placed in half-round trays where  
7 they are burned at high temperature (1600 degrees F.) for about four  
8 hours.

9 On removal from the incinerator the trays are allowed to cool and  
10 then moved into an adjacent building and dumped next to a cutter which  
11 separates out copper, aluminum, and silicon steel. Ash is left as a  
12 waste product generated by the incineration process. The instant case  
13 is, to a major extent, concerned with Ross's procedures for handling  
14 this ash.

#### 15 IV

16 In 1976, the Legislature enacted the forerunner of today's state  
17 hazardous waste management statute, (Chapter 70.105 RCW) empowering  
18 the Department of Ecology to adopt implementing regulations. Civil  
19 penalties of up to \$1,000 per day per violation were authorized to be  
20 assessed. Chapter 101, Laws of 1975-76, 2nd Ex.Sess.

21 The state program was expanded in 1980 by explicitly granting  
22 Ecology the power and responsibility to implement the federal Resource  
23 Conservation and Recovery Act (RCRA)(42 USC, Sec. 6901 et sec.)  
24 Chapter 144, Laws of 1980. In 1983 the general civil penalty was  
25

1 increased to a maximum of \$10,000 per day per violation, and a new  
2 penalty (also \$10,000 per day) was added for failure to take  
3 corrective action as specified in a compliance order. Chapter 172,  
4 Laws of 1983.

5 Comprehensive regulations implementing Ecology's role under RCRA  
6 were promulgated as Chapter 173-303 WAC in 1982. The regulations,  
7 among other things, set up a program of self-designation whereby  
8 entities which generate wastes are required to determine, by reference  
9 to listings in the rules themselves or by testing, whether the wastes  
10 are subject to regulation as dangerous wastes.

#### 11 V

12 Under Ecology's regulations the term "dangerous wastes" include  
13 the whole universe of wastes regulated by Chapter 173-303 WAC. The  
14 term "extremely hazardous waste" (EHW) means those "dangerous wastes"  
15 identified as extremely hazardous. The abbreviation "DW" is used to  
16 refer to those "dangerous wastes" which are dangerous only, but not  
17 extremely hazardous. See WAC 173-303-040.

#### 18 VI

19 In June of 1984, Ecology inspectors took a sample of ash from  
20 Ross's Logan Hill incinerator and subjected it to a procedure for  
21 determining whether it met the criteria for EHW. The testing was not  
22 performed until April 16, 1985. At that time, however, in a 96 hour  
23 toxicity test, all of the test species (rainbow trout) died. This led  
24 Ecology to identify Ross's ash tentatively as EHW.

1       At about the same time in 1985, the Legislature adopted an  
2 amendment extending state regulation to all waste generated from  
3 salvaging, rebuilding or discarding transformers containing PCEs, but  
4 not regulated federally. This applied to transformers with PCB levels  
5 below 50 ppm. Chapter 65, Laws of 1985. The state regulations were  
6 altered to reflect this change. WAC 173-303-9904.

7       Thus, as of the spring of 1985, it was clear that Ross's  
8 operations at Logan Hill were subject to regulation under the state's  
9 hazardous waste program.

## 10                               VII

11       Ecology's first inspection of the Ross facility was on November  
12 12, 1985. At that time, management at Ross either knew or was advised  
13 that Ecology had identified the Logan Hill ash wastes as subject to  
14 regulation. As a result of the observations made in November, a full  
15 RCRA inspection was conducted on December 4, 1985.

16       These inspections revealed that Ross was treating its incinerator  
17 ash as an ordinary solid waste and disposing of it at the Centralia  
18 Sanitary landfill. Ecology told the company that the agency would  
19 regard the ash as a dangerous waste until it was shown not to be.

20       Ross thereupon agreed to discontinue disposal of the ash at the  
21 landfill. By January 1986, the company had made arrangements to have  
22 its ash disposed of at an approved site in southern Idaho.

VIII

On March 5, 1986, Ecology's inspector wrote Ross a ten page letter detailing the problems observed on the previous year's inspections of the Logan Hill facility and prescribing corrective steps.

This letter reiterated that the incinerator ash had preliminarily been identified as EHW due to aquatic toxicity, and noted that it might also be regulated due to other parameters. Foss was asked to take the steps necessary to designate this waste definitively and assess the risks posed by it.

Ecology's letter also directed Ross to comply with the regulations dealing with accumulating and storing the ash while on-site. These regulations impose requirements regarding the placement of wastes in non-leaking containers, keeping such containers closed, and labeling them so as to identify: the beginning date of accumulation, that they contain dangerous wastes, and the major risks associated with the waste.

Additionally, the letter noted that ash was being vented to the outdoors from the metal cutting area and stated that this must stop. Ross was told that new management procedures implemented to prevent the release of incinerator ash must be incorporated into their training plan.

1 Numerous other deficiencies and requirements were discussed, but  
2 waste designation and ash management headed the list.

3 IX

4 Ross replied by letter on March 25, 1986, stating, among other  
5 things, that the ash was assumed to be a regulated waste and therefore  
6 was being disposed of at the Idaho disposal site. Inferentially this  
7 meant that Ross was not going through the trouble to analyze and  
8 formally designate the ash, but was just planning to treat it as  
9 though it had been designated.

10 Ross advised that the escape of ash had been eliminated by the  
11 installation of a catch box on the exterior of the fan shroud where  
12 the ash was being sucked out of the metal cutting building.

13 Moreover, the company stated that operational changes had been  
14 made as to the proper storage and labeling of dangerous waste  
15 containers.

16 On the same day Ross replied to Ecology's letter, Ecology sent a  
17 formal enforcement order to the company requiring compliance with  
18 numerous listed record-keeping, planning, and management  
19 requirements. (Order No. DE 86-287).

20 X

21 On August 11, 1986, Ecology performed a drop-in inspection of the  
22 Ross Electric Logan Hill facility. Four violations of the dangerous  
23 waste regulations were found. In an Order issued later, (Order No. DE  
24

25  
26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND ORDER

86-S157), these were, described as "two critical violations and two serious violations", as follows:

1. Incinerator ash was released to the environment from incinerator trays which had already been fired and were placed on concrete to cool. The concrete slab was sloped to drain to a gravel lined ditch which discharges to ground and surface waters of the property. Incinerator ash had spilled out of the trays, off of the concrete on to the soils/gravel adjoining this pad. The incinerator trays containing this ash were not in any way protected from rain. This ash is regulated as an extremely hazardous toxic (EHW)(#WT01) and a listed PCB waste residue (#W001). This release violated WAC 173-303-395(4)(b), -145(2) and (3) and may cause a violation of WAC 173-303-430(3).
2. Incinerator ash was also released to the environment from the fan box at the rear of building #1. The ash was released both during fan operation and in changing of the fan filters. The soils in this area were covered with ash. A sample of the ash was taken and sent for bioassay, metals and dioxin analysis. The bioassay analysis proved the ash to be an extremely hazardous waste (#WT01), due to toxicity. Dioxin analyses of the ash showed various isomers of dioxin were present. The sum of all isomers found in this sample was 10.35 parts per billion. Dibenzofurans were found present at a level of 57 parts per billion. Metal analyses are still pending.
3. The incinerator monitoring report for temperature the day of the inspection was completed through August 11, 1986, 8:30 a.m., although it was checked at 7:40 a.m. the same day. This is in violation of 40 CFR Part 265.347 and thus by reference WAC 173-303-400.
4. Three containers containing incinerator ash awaiting transport to a dangerous waste disposal facility were unlabeled and not securely closed in violation of WAC 173-303-200(c) and (d).



XI

The two ash management violations were the ones Ecology intended to identify as "critical". Both of these violations occurred under circumstances in which the inescapable inference is that the problems involved had been going on for several days, if not longer. In the case of the ash spilling from the concrete slab, the situation had been allowed to develop at least over the preceding weekend. In the case of the ash near the fan box, a number of dirty fan filters were strewn on the ground in the near vicinity.

As to these "spill" events, no one from Ross notified the authorities. No remedial efforts were initiated until after the problems were pointed out by the inspectors.

XII

Ross responded to the August 11, 1986 inspection through a letter received by Ecology on September 5, 1986. The letter stated that the incinerator trays were henceforth being cooled in a covered area and that the gravel at the edge of the concrete slab where ash was spilled had been removed and placed in disposal boxes.

The letter advised that a new ash collection system was being installed in the metal cutting building, that the old system had been disassembled and that ash was being contained in the building pending installation of the new system.

The letter promised that ash containers would be labeled and

1 securely closed in the future, and that temperature monitoring would  
2 be done at fifteen minute intervals with temperatures recorded as they  
3 occur.

#### 4 XIII

5 Ross Electric removed spilled ash and some underlying soil in the  
6 vicinity of the fan box as well as the ash-laden gravel at the edge of  
7 the concrete slab. They also purchased a new dust collection system  
8 for the metal cutting area. The system removes the ash from the air  
9 inside the building and automatically deposits it directly into  
10 barrels for eventual shipment to an approved facility. This was  
11 essentially an off-the-shelf item available on the market.

#### 12 XIV

13 On November 7, 1986, Ecology sent the Order (No. DE 86-S157)  
14 which set forth the description of violations quoted above. The Order  
15 spelled out actions required by Ecology, including the sampling of  
16 soils at the two areas where releases of ash were observed and  
17 analysis of these samples for extraction procedure (EP) toxicity and  
18 total metals, for total copper, for PCBs, for dioxins and furans.  
19 Since some cleanup had already occurred, the Order called for taking  
20 samples "at the affected soils surface, which was remaining after the  
21 cleanup excavation was complete."

22 The Order also called for sampling and analysis of water in a  
23 well on adjoining property and for a report on results of all sampling  
24 within 65 days.

1 Ecology directed that a consultant be hired for all this work.

2 XV

3 At the same time, the regulatory Order (No. DE 86-S157) was sent  
4 out, Ecology also issued a Notice of Penalty Incurred and Due (No. DE  
5 86-S150). The penalty notice described the violations in terms  
6 identical to those in the regulatory order. A penalty of \$25,000 was  
7 assessed.

8 XVI

9 Ross appealed both the regulatory order and the civil penalty to  
10 this Board on December 16, 1986. The matter was given docket number  
11 PCHB No. 86-225.

12 XVII

13 Although both the order and the penalty were appealed, Ross  
14 decided not to resist complying with the order and hired a consultant  
15 to carry out the sampling and obtain the analyses required. The  
16 sampling took place on August 26, 1986 with Ecology personnel in  
17 attendance.

18 At that time it was noted that some of the incinerator trays -  
19 the source of one of the ash spills observed in August - had holes in  
20 them. Ross, thereupon, undertook to have these trays rebuilt to  
21 eliminate the holes and modified by adding a lip so that ash cannot  
22 escape.

XVIII

The bioassay performed on the sample from the area near the fan box collected by Ecology's inspectors on August 11, 1986, showed the ash to be at least DW. (The regulatory order is incorrect where it says that the test proved the ash to be EHW.)

The EP toxicity test performed on the sample revealed levels of lead in excess of the regulatory threshold.

The test performed for dioxins did not convert all the values derived to an equivalency for 2378 TCDD which is the dioxin form commonly used for regulatory purposes. Therefore, it is not definitively known whether dioxin levels exceed the 1 ppb 2378 TCDD level used by EPA as the action level for remediation. However, in light of the various values which were derived, conservative practice dictates treating the waste as dangerous by reason of its dioxin content.

Accordingly, it is clear that the characterization of Ross' ash as a waste subject to regulation and control under the state hazardous waste law is proper for several reasons. And, indeed, Ross does not dispute that its incinerator ash is a dangerous waste. However, Ross still has not provided an analytical characterization showing how dangerous the waste really is.

XIX

Ross' consultant sampled soil downstream in the drainage ditch which flows from the gravel area by the concrete slab where one of the ash spills occurred. No evidence that contaminants were migrating off-site in surface water was found. Likewise, no evidence of contamination of groundwater was detected.

Soil samples were taken in areas remote from the incinerator, and no indication of air-borne ash transport was found. However, it was discovered that an area where fan boxes had been stored briefly, contained elevated levels of PCBs, dioxins and furans.

Thus, though releases to the environment occurred, the spilled contaminants were not shown to have migrated off-site.

XX

By the time of hearing in this matter, approximately a year after order issuance, Ross with the help of counsel and its consultants had largely remedied any prior problems, and appeared ready to operate at Logan Hill in compliance with dangerous waste regulations. Moreover, plans had been finalized for a new building on site to move the operation into.

Two matters contained in the enforcement order of March 25, 1986 (Order No. DE 86-287) remained to be accomplished. These concerned: a) the lack of written waste plan and b) the lack of a financial assurance mechanism to provide for possible clean-up expenses. In

1 substance, the company was complying with the waste plan requirement,  
2 but the financial assurance issue remained open.

3 XXI

4 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
5 adopted as such.

6 From these Findings of Fact the Board makes these

7 CONCLUSIONS OF LAW

8 I

9 The Board has jurisdiction over the parties and the subject  
10 matter. Chapters 43.21B and 70.105 RCW.

11 II

12 There is no contention that the four situations observed by  
13 Ecology inspectors on August 11, 1986, did not occur or did not  
14 involve violations of the dangerous waste regulations. The two ash  
15 spills in question were cited under provisions which require immediate  
16 notification of regulatory authorities when discharges occur to the  
17 environment and immediate action to contain or clean up the wastes  
18 released. WAC 173-303-145(2) and (3). The container labeling  
19 requirements are clearly spelled out in WAC 173-303-200(c)(d). The  
20 incinerator monitoring provisions implicitly disallow the logging of  
21 readings not actually observed. 40 CFR 265.347; WAC 173-303-400.

22 We conclude that violations did occur in all four instances.  
23  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

III

Ross argues that the \$25,000 penalty assessed is excessive and seeks to have it reduced. The company asserts that the violations were not as serious as alleged, pointing out that no harm to health or to the off-site environment appears to have occurred.

Ross emphasizes the complexity of the regulations and avers that it has cooperated with Ecology and put forth considerable effort to comply. It draws attention to a new and progressive management attitude and, particularly, urges the Board to take note of the efforts made to achieve full compliance since the August 11, 1986 inspection.

IV

RCW 70.105.080 provides for assessing civil penalties of "every person who fails to comply with any provisions of this chapter or of the rules adopted thereunder." As noted, the maximum penalty per violation was raised from \$1,000 to \$10,000 per day in 1983. At the same time, in the case of a continuing violation, every day's continuance was made a separate and distinct violation. Section 2, Chapter 172, Laws of 1983.

RCW 70.105.080 is the basis for the penalties assessed here. However, RCW 70.105.095 likewise provides for civil penalties of up to \$10,000 per day for failure to take corrective action as specified in a compliance order and such penalties can be assessed for "each day of

1 continued noncompliance". In the exercise of prosecutorial  
2 discretion, Ecology here issued no penalties for non-compliance with  
3 its March 25, 1986, compliance order, although on the record before  
4 us, it undoubtedly could have.

5 V

6 The maximum penalty which could have been assessed under RCW  
7 70.105.080 alone for the violations observed on August 11, 1986, has  
8 not been determined. But at \$10,000 per violation, the sum could have  
9 been considerably more than the penalty before us. Each of the ash  
10 "spill" incidents involves at least two violations (no reporting and  
11 no remedial efforts) which continued for a number of days. When those  
12 violations are considered together with the labeling and monitoring  
13 violations, the total penalty could have been several times the  
14 \$25,000 penalty actually assessed.

15 VI

16 In evaluating the amount of civil penalties in this strict  
17 liability regime, we look at several factors bearing on reasonableness  
18 in light of statutory aims.

19 The factors considered included:

- 20 a) the nature of the violation;  
21 b) the prior behavior of the violator;  
22 c) actions taken after the violation to solve the problem.

23 Jensen's Kent Prairie Dairy v. Department of Ecology, PCHB No. 84-240  
24 (1984).

25  
26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND ORDER  
PCHB No. 86-225



VII

Of these factors the most important is the first - the nature of the violation. U.S. Air Force v. Department of Ecology, PCHB No. 85-57 (1986). We conclude that the ash "spill" violations are offenses of substantial gravity for two reasons.

First, the legal scheme involved makes them so. The express statutory purposes include "the prevention of problems related to improper management of hazardous substances before such problems occur". The detailed rules in Chapter 173-303 WAC are principally directed toward this preventative end. The strategy behind the system is to keep hazardous wastes from being released into the environment, and, thus, any such releases must be seen as matters of critical concern. The potential harm from the continuance of behavior leading to such events is what the law seeks to eliminate.

Second, the violations in the instant case could only have been the result of a lack of due care. They were, as subsequent actions show, easily preventable. The problems discovered reflect gross inattention to proper housekeeping even after Ecology had gone to considerable lengths, without imposing penalties, to advise the company of the proper course of behavior.

The violations involved are not technical. The complexity of the regulations as a whole has no bearing on them. The matter is simple. Ross' management had to be aware that the point of the elaborate

1 process of collecting its waste and shipping it to a specially  
2 approved site is to prevent release of the material to the  
3 environment. They simply failed to see to it that requirements they  
4 fully understood, were observed.

#### 5 VIII

6 The prior behavior of the violator here is what makes the  
7 violations of August 11, 1986, so surprising. The violations do not  
8 involve matters about which the company can plead ignorance. They  
9 involve matters in which Ross had promised to comply.

10 Ross had long since agreed to treat the ash as dangerous waste.  
11 Under the circumstances, the spills which occurred, without being  
12 reported or immediately cleaned up, undercut all the protestations of  
13 good intention.

14 Moreover, by August 1986, the company was fully aware of the  
15 containment and labeling requirements and was likewise aware that  
16 temperature of the incinerator had to be periodically monitored and  
17 contemporaneously recorded.

18 The conclusion is inescapable that before the inspection of  
19 August 11, 1986, the hazardous waste program was not taken seriously  
20 enough for compliance to be achieved.

#### 21 IX

22 The consultant and legal services retained for Ross have been of  
23 high quality and productive. The company appears to be progressing.

1 However, we are convinced that the threat of penalties and the  
2 penalties themselves contributed substantially to this result. Given  
3 the nature of the violations, and Ross' prior behavior, the  
4 post-violation actions do not outweigh the other factors considered.

5 Under all the facts and circumstances we conclude that the  
6 \$25,000 penalty assessed - substantially less than the maximum - is  
7 reasonable.

8 X

9 Considerable time at hearing was devoted to an alleged incident  
10 of dumping ash from the Logan Hill operation at the Centralia Landfill  
11 three months after the August 11, 1986 inspection. We did not find  
12 consideration of this incident necessary to our result here and,  
13 therefore, decline to reach any findings or conclusions about it in  
14 this case.

15 I

16 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
17 adopted as such.

18 From these Conclusions of Law the Board enters the following  
19  
20  
21  
22  
23  
24  
25

ORDER

The Notice of Civil Penalty (No. DE 86-S150) is AFFIRMED.  
DONE this 7th day of February, 1989.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford  
WICK DUFFORD, Presiding

Judith A. Bender  
JUDITH A. BENDER, Member

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
PCHB No. 86-225

(20)